Supreme Court, U.S.
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No. 92-1310

In the Supreme Court of the United States

OCTOBER TERM, 1992

ELIE J. BAGHDADY,
PETITIONER,

v.

LARRY D. SADLER AND
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were petitioner Elie J. Baghdady and respondents Larry D. Sadler and Merrill Lynch, Pierce, Fenner & Smith, Inc.

The parent company of Merrill Lynch, Pierce, Fenner & Smith, Inc., is Merrill Lynch & Co., Inc.

The subsidiaries not wholly owned by Merrill Lynch, Pierce, Fenner & Smith, Inc., are: Merrill Lynch Life Agency Inc. (Ohio); Merrill Lynch Life Agency Inc. (Oklahoma); Merrill Lynch Life Agency Ltd. (Mississippi); Merrill Lynch-Nomura Management Company, Inc.; ML Life Agency Inc.; and Wagner Stott Clearing Corp.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch"), and Larry D. Sadler ("Sadler"), respectfully request that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

In July, 1981, petitioner opened an account in Merrill Lynch's Boston office. In opening the Boston account, petitioner signed a "Standard Option Agreement" providing that "[a]ny controversy between [petitioner and Merrill Lynch] arising out of such option transactions or [the] agreement shall be settled by arbitration." (Petition, p. 2a.)

In December, 1981, petitioner directed Merrill Lynch to open an account for him at its Burlington, Massachusetts, office. Merrill Lynch transferred petitioner's trade balances from the Boston account. Petitioner then used the Burlington account to engage in options transactions. He closed the Burlington account in 1982. (Petition, p. 3a.)

Petitioner filed suit *pro se* on August 2, 1985, in federal district court (the "1985 case"), claiming damages in excess of $4,300,000 as a result of respondents' handling of the Burlington account. (Complaint, Paragraphs 25, 34, 38, 41, 44, 47, 50, 53; Petition, pp. 6, 3a.) Respondents moved to compel arbitration on the basis of the Standard Option Agreement. Counsel appeared for petitioner on November 18 and withdrew on December 13, 1985; new counsel, who were to represent petitioner until he sought a writ of certiorari, appeared on October 14, 1986. (1985 Docket.)

In opposing the motion, petitioner did not allege any fraud in connection with his execution of the agreement or its arbitration provision. Rather, he averred that "because I was in a hurry to establish the account, I did not read the printed text of the agreement . . . Hence, . . . I did not realize that it provided for compulsory arbitration of disputes . . . I did not intend to enter into an arbitration agreement regarding that account" or any other account. (Affidavit, Paragraphs 12, 18, 19.) He also stated that he "never signed any documents in connection with the opening of" the Burlington account. (Affidavit, Paragraph 17.)

On April 2, 1987, the district court granted the motion to compel arbitration. Judge McNaught held that:

(1) It was factually undisputed that, in opening the Boston account, petitioner executed the Standard Option Agreement;

(2) petitioner thereafter opened the Burlington account, to which were transferred his securities from the Boston account; and

(3) petitioner was bound by the arbitration provisions of the Standard Option Agreement. (Opposition, pp. A2-A3.)[1]

In the ensuing arbitration, petitioner named as respondents Merrill Lynch, Sadler (the manager of Merrill Lynch's Burlington office), and John Voll (petitioner's broker at the Burlington office). (Arbitration Complaint, Paragraphs 1, 4, 5, 11(c).) Petitioner's arbitration complaint did not challenge the arbitrability of his claims.

By an award dated February 26, 1991, the arbitration panel decided, without explanation, that:

(1) Merrill Lynch was liable to petitioner in the amount of $60,720.15;
(2) petitionere's claim for treble damages was denied;
(3) Sadler was liable to petitioner but was not required to pay monetary demages;
(4) the claims against Voll were dismissed; and
(5) each party would bear its own costs; including attorney's fees.

On May 24, 1991, petitioner tried to move in the 1985 case to vacate or correct the arbitration award. (Vacation Petition.) The district court, however, having closed the 1985 case on November 21, 1989, opened a new case (the "1991 case"). On June 25, 1991, Judge Skinner allowed petitioner's June 4 motion to reopen the 1985 case.

On January 14, 1992, Chief Judge Tauro, acting in both the 1985 and 1991 cases, denied petitioner's petition to vacate the award and allowed respondents' cross-motion for confirmation (while denying their request for attorney's fees). Chief Judge Tauro held, among other things, that, the award could be vacated only if petitioner "show[ed] something in the

[1] Judge McNaught's opinion is included in an addendum to this Opposition because petitioner did not include it with his Petition.

record, other than the result, that indicates that the arbitrators knew the law and expressly disregarded it." (Petition, p. 10a.)

The court of appeals affirmed both the order compelling arbitration and the confirmation of the ensuing award, holding that:

(1) The Standard Option Agreement committed petitioner to arbitrate controversies regarding "any transaction" involving put and call options in all accounts petitioner might have with Merrill Lynch; the controversy before the court involved put and call option transactions in one of petitioner's accounts with Merrill Lynch; therefore, the controversy "is thus clearly within the terms of the agreement to arbitrate" (Petition, pp. 3a-4a);

(2) petitioner's claim that he did not intend the Burlington account to be governed by the Standard Option Agreement is not material because that agreement "was clear on its face and its scope was unrestricted" (Petition, p. 4a);

(3) petitioner's reliance on *Par-Knit Mills, Inc.* v. *Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3rd Cr. 1980), was misplaced because the doubt about arbitration that, in *Par-Knit*, had to be submitted to a jury concerned the authority of a company's production manager to bind his company, and there was no dispute over petitioner's authority to bind himself (Petition, p. 5a);

(4) petitioner did not assert any statutory abuse of the arbitration process, and he failed to show that the arbitrators manifestly disregarded the law because he had nothing but his displeasure with the result to support his claim (Petition, pp. 5a-6a); and

(6) petitioner's claim that the arbitrators made a mistaken finding of fact was beyond the scope of judicial review (Petition, p. 7a)

REASONS FOR DENYING THE WRIT

The writ should be denied for three reasons. First, as the analysis in the court of appeals' opinion demonstrates, there is no conflict between the First Circuit's decision in this case and *Par-Knit Mills* v. *Stockbridge Fabrics Co.*, 636 F.2d 51 (3rd Cir. 1980). Second, petitioner did not present below either of his current fraud claims; in fact, he disclaimed one of them in his affidavit to the district court and his arbitration counsel disclaimed the other in that proceeding. Third, the First Circuit's application of the manifest disregard standard does not create a circuit conflict: that court merely refused to second-guess the arbitrators' findings based on a voluminous record of seven hearing transcripts and numerous exhibits.

I. There Is No Conflict With *Par-Knit Mills*.

Petitioner contends that the order compelling arbitration in this case conflicts with the statement in *Par-Knit Mills* v. *Stockbridge Fabrics Co.*, 636 F.2d 51 (3rd Cir. 1980), that "[a]n unequivocal denial that the agreement had been made, accompanied by supporting affidavits, . . . in most cases should be sufficient to require a jury determination on whether there had in fact been a 'meeting of the minds'." *Id.* at 55. According to petitioner, "[t]he District Court erred in not holding a trial on the fundamental factual question of whether there was a meeting of the minds between Petitioner and Respondents to arbitrate disputes arising from his account." (Petition, p. 18.)

Par-Knit Mills does not support the claims petitioner makes for it. The issue for the Third Circuit was not the parties' subjective intentions, but rather Par-Knit's claim that no one

with authority to bind the company ever agreed to arbitration. In that case, after having made several oral contracts, Stockbridge sent Par-Knit written documents containing, on one side, "a space designated for signature entitled 'Buyer's Acceptance'," and, on the other side, twenty-two "Terms and Conditions," including one providing for arbitration. *Id.* 636 F.2d at 52-53. The Par-Knit plant manager sent the documents to the production manager who, according to an affidavit, signed them "as confirmation only of the delivery dates contained therein." *Id.* at 53.

Focusing on the question of the production manager's authority to bind the company, the Third Circuit held that "Par-Knit is entitled to a trial to determine whether or not an agreement was reached and, if so, whether said agreement properly included an agreement to arbitrate." *Id.* at 54-55. *Par-Knit* does not conflict with the present case where there never has been any doubt about petitioner's authority to agree to arbitration. (See Petition, p. 5a.)

II. Petitioner Did Not Present Below The Fraud Claims That He Now Seeks To Raise In This Court.

Petitioner should not be allowed to raise claims of fraud in the inducement of, or tampering with, the arbitration agreement for the first time in seeking certiorari. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958), *citing Duignan* v. *United States*, 274 U.S. 195, 200 (1927). *Accord*, *e.g.*, *Youkim* v. *Miller*, 425 U.S. 231, 234 (1976). In the present case, no exceptional circumstances warrant waiving this general prohibition.

A. *Petitioner's district court affidavit opposing arbitration refutes his new claim of fraud in the inducement.*

Below, petitioner's opposition to arbitration amounted to a contract dispute over the scope of the Standard Option Agreement. As respondents noted in their brief to the court of appeals, without dispute by petitioner in his reply brief, petitioner never "alleged any fraud, duress, or other wrongful act in connection with his signing the Option Agreement." (Respondents' Brief, p. 21.) In fact, petitioner averred to the district court that "this case does not involve, in any way, transactions or occurrences in" the Boston account. (Affidavit, Paragraph 21.)

Rather, petitioner claimed below that he failed to read the Standard Option Agreement before signing it because he "was in a hurry to establish the [Boston] account." (Affidavit, Paragraph 12.) But absent fraud or some other wrongdoing, under governing New York law (Standard Option Agreement, Paragraph 12), the general rule is that "'the signer of a written agreement is conclusively bound by its terms'." *International Tin Council* v. *Amalgamet, Inc.*, 138 Misc. 2d 383, 392, 524 N.Y.S.2d 971, 978 (N.Y. Sup. Ct. 1988) (dismissing petition to stay arbitration by a party claiming not to have read the agreement), *quoting Columbus Trust Co.* v. *Campolo*, 110 A.D.2d 616, 617, 487 N.Y.S.2d 105, 107 (N.Y. App. Div.), *aff'd*, 66 N.Y.2d 701, 496 N.Y.S.2d 425, 487 N.E.2d 282 (1985).

Also immaterial was petitioner's alleged lack of an intention to agree to arbitration. (Affidavit, Paragraph 12.) What counts is his "external expression of intention [in signing the Standard Option Agreement] as distinguished from [any] undisclosed intention." Restatement (Second) of Contracts § 2 cmt b (1981).

The issue presented below, therefore, was whether the Standard Option Agreement executed by petitioner when he opened the Boston account required him to arbitrate claims

regarding option transactions in the Burlington account. This was a simple question of contract interpretation: As confirmed by paragraphs 3 and 8 of the Standard Option Agreement, the arbitration agreement "extended to all accounts the customer might have with Merrill Lynch." (Petition, p. 4a.)[2]

B. Petitioner's arbitration counsel expressly disclaimed the tampering charge now being advanced.

Petitioner says that, in the arbitration proceeding, he "argued that the agreement to arbitrate had been 'tampered' with." (Petition, p. 16 n. 6; see also Petition, p. 30.) Even if he had made such a claim, it would have no bearing on the correctness of the order compelling arbitration because petitioner never presented the claim to the district court or to the court of appeals.[3]

However, petitioner not only did not argue to the arbitrators that there had been tampering with the agreement to arbitrate, his counsel expressly disavowed such a claim. The matter arose as follows: The terms of the Standard Option Agreement appear on the right-hand side of a form. The left-hand side of the form contains spaces for the customer's

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[2] There is an additional reason why the parties' disputes were arbitrable. Petitioner agreed to arbitrate controversies "arising out of . . . option transactions or [the] agreement." (Petition, p. 2a.) Petitioner's contention that the agreement is limited to transactions in the Boston account, and does not extend to all option transactions in all of petitioner's accounts with Merrill Lynch, is a dispute about the scope of the agreement and, therefore, is itself a controversy "arising out of . . . [the] agreement." Hence, the disputes were arbitrable for that reason as well.

[3] If information developed in the arbitration proceeding were relevant to the arbitrability question, however, it would be noteworthy that, on October 8, 1981, petitioner signed a Customer Agreement with Merrill Lynch providing that, "[i]n consideration of your accepting and carrying for the undersigned one or more accounts . . . 11. It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration." (Amended Statement of Arbitration Answer, Ex. B.) The Customer Agreement is part of the record that petitioner put before the court of appeals.

address, financial condition, and investment objectives. (Motion to Compel Arbitration, Ex. A.) In the arbitration, petitioner claimed that Merrill Lynch filled in the left side of the form after he had signed it. In offering a copy of the form as an exhibit, petitioner's counsel said: "I am not offering this in any way to relitigate any issue of arbitrability . . . The issue of the right side [containing the arbitration agreement] is really irrelevant for the reasons I'm offering it." (NASD Hearing Transcript Vol. 3, p. 52.)

III. The Issues Raised By Petitioner Concerning The Manifest Disregard Standard For Reviewing Arbitration Awards Do Not Merit This Court's Attention.

Petitioner's claim that the arbitrators manifestly disregarded the law amounts to a request that this Court comb through "voluminous" exhibits and hearing transcripts, (Petition to Vacate Arbitration Award, p. 6), to second-guess the arbitrators.

Petitioner continues to base his manifest disregard claim on his assumption that the arbitrators found respondents liable on all his claims. (Petition, pp. 3, 28.) Thus, petitioner told the district court that "[t]he gravamen" of his claim that the arbitrators manifestly disregarded the law was the fact that they awarded him less than five per cent of his claimed damages. (Vacation Petition, p. 5.)

But the arbitrators did not make an omnibus finding of liability. They limited themselves to saying that Merrill Lynch "is hereby liable to Claimant and shall pay claimant [$60,720.15]." (Award.) As petitioner himself pointed out to the district court, moreover, this amount was "the sum of [petitioner's] losses on precisely two transactions." (Memorandum on Vacation Petition, p. 20.) The arbitrators could have viewed these two transactions as distinguishable

from the twenty-five other transactions about which petitioner complained.

Plaintiffs' major claim was that respondents engaged in unauthorized trades. This claim turned on petitioner's own credibility and that of his daughter. However, respondents gave the court of appeals several examples that might have led the arbitrators to disbelieve petitioner and his daughter. (Respondents' Brief, pp. 15-19.)

For his smaller claim, petitioner also had testimony from his accountant that Sadler had agreed to reverse two trades at no cost to petitioner. However, that testimony was somewhat imprecise as to exactly which two trades were to be reversed. It thus is possible that the arbitrators, in accepting petitioner's rescission claim because it had support from a disinterested witness, may have misunderstood which two trades the accountant thought Sadler had agreed to rescind.

It was in this context that the court of appeals correctly held that a possible factual error by the arbitrators was "beyond the scope of our review." (Petition, p. 7a.) The court of appeals' decision followed directly from this Court's recognition that "[c]ourts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987). There is no conflict between the court of appeals decision in this case and decisions of this Court or other circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 9, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-3101-Mc

ELIE J. BAGHDADY,
PLAINTIFF,
v.
LARRY D. SADLER AND
MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.
DEFENDANTS.

MEMORANDUM AND ORDER
on
DEFENDANTS' MOTION TO COMPEL ARBITRATION

April 2, 1987

MC NAUGHT, D. J.

After hearing and consideration, the defendants' motion to compel arbitration is allowed. The plaintiff did not quarrel with the proposition that a Rule 10(b)(5) dispute is referable to arbitration in the First Circuit in the light of the decision of our Court of Appeals in *Pave* v. *Moseley, Hallgarten, Estabrook & Weeden, Inc.*, _____ F. 2d _____ 1986 (although plaintiff reminded the Court that the issue has yet to be decided by the United States Supreme Court in a case presently pending). Plaintiff also conceded that the state claims are arbitrable. He insisted however that there is an issue as to whether there is an agreement in force between the parties which is binding upon the plaintiff, pertaining to arbitration.

The facts are not disputed. The effect of those facts is an issue. The plaintiff opened an account with the Boston office of the defendant "Merrill Lynch" on July 29, 1981. The new account was given a number: 818-(identifying the Boston office of defendant) 73322. At that time a number of documents were executed, including a "Standard Option Agreement" (see docket document #3 and its attachment) which provided in part that: "any controversy between us arising out of such option transactions in this Agreement shall be settled by arbitration . . .". On December 11, 1981 one of two things happened. Either a new account was opened by Dr. Baghdady at the Burlington office of the defendant "Merrill Lynch" or the account which Dr. Baghdady had in Boston was transferred to the Burlington office. Dr. Baghdady insists that it is the former — the defendants insist that it was the latter. Dr. Baghdady through counsel called our attention to an exhibit lettered "E" attached to "plaintiff's sur-reply in opposition to defendants' motion to compel arbitration". That document bears, A LEGEND "NEW ACCOUNT INFORMATION". Boxed directly to the right however appears a legend "TRANSFERRED FROM (OFFICE) ACCOUNT NO." and typed therein is the number "818-73322". In another box toward the bottom of the exhibit appears the typewritten word "transfer". Toward the right margin of that document appear the words, in capital letters, "NEW ACCOUNT NO." and typed therein is the number "822-55654". Apparently the number 822 designates the Burlington office of Merrill Lynch, whereas the number 818 designated the Boston office. I conclude that this was not a new account, but was a transferred account. If it were a new account there would be no necessity, and indeed very little sense, in placing upon this document the word "transfer" and the account number from the Boston office "818-73322". Counsel for Dr. Baghdady insists that the agreement to arbitrate did not apply to the Burlington account. He bases his argument upon the fact that when the account in Burlington was set up, the original agreement

was changed. Specifically, he calls this an "alteration of the option agreement" and labels it an "ex post facto effort to argue that the Burlington account was not a new account". I don't consider this an "altered document" as it was described by Dr. Baghdady's counsel. Finally, the conclusion that the account was transferred is buttressed by the fact that when the original account was opened in Boston certain documents were executed which were not executed again when the account was transferred to the Burlington office.

In view of the foregoing the motion of the defendants to compel arbitration is allowed.

SO ORDERED.

s/ JOHN J. MC NAUGHT

JOHN J. MC NAUGHT
United States District Judge